No. 49340-3-II

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

JEREMY GIBSON,

Appellant,

v.

AMERICAN CONSTRUCTION COMPANY, INC.,
a Washington corporation,

Respondent.

BRIEF OF RESPONDENT

Eric R. McVittie
WSBA #20538
Markus B.G. Oberg
WSBA #34914
LeGros, Buchanan & Paul
4025 Delridge Way SW, Suite 500
Seattle, WA 98106-1271
(206) 623-4990

Attorneys for Respondent
American Construction Company,
Inc., a Washington corporation

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A. INTRODUCTION

The Honorable Philip Sorensen correctly applied U.S. Supreme Court authority, and should be affirmed. A maritime worker who receives a formal award at the conclusion of the adjudication of his Longshore and Harbor Workers' Compensation Act ("LHWCA") claim and enters into a settlement agreement with his employer, approved by the LHWCA adjudicator, wherein the worker expressly stipulates that his claim falls within the jurisdiction of the LHWCA, is barred from subsequently pursuing the mutually exclusive maritime remedy (a Jones Act negligence and/or unseaworthiness action) against said employer.

Gibson proffers that this case presents an opportunity for this Court to apply the teachings of the U.S. Supreme Court. Indeed, that is what the trial court did, and this Court need simply affirm the trial court's decision. The U.S. Supreme Court, in *Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S. Ct. 486, 489-90, 116 L. Ed. 2d 405 (1991), directed that where, as here, a formal LHWCA award has been entered, the worker is barred from pursuing an action under the Jones Act. That is the case before this Court.

Gibson dramatizes his injury. The facts are that he was injured on the job, obtained treatment, and then returned to work the following day. In fact, he continued his regular work schedule for over nine months after his on-the-job injury. After 18 months of receiving LHWCA benefit

payments (in the amount of $191,826.18), he waived his entitlement to a hearing, and filed an Application for Approval of Settlement. Therein he expressly stipulated that "This claim comes within the jurisdiction of the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. §901 et seq." Gibson thus secured a $635,000 new money settlement. The Department of Labor ("DOL") adjudicator then formally approved the settlement, resulting in the final disposition of the adjudicated claim, the discharge of the employer's liability, and the formal award contemplated by the U.S. Supreme Court in *Gizoni*.

Nevertheless, within weeks of entering into a binding settlement with his employer and obtaining a formal award under the LHWCA, Gibson turned around and filed suit under the Jones Act and general maritime law, seeking a second recovery for the same injury. However, a maritime worker's remedy comes under *either* the LHWCA (for maritime workers other than "seamen") *or* the Jones Act and general maritime law (for seamen). The two are mutually exclusive and Gibson cannot recover under both. By settling with his employer and obtaining a formal award under the LHWCA, Gibson elected his remedy and fully resolved his injury claims. Any further actions are barred by the doctrine of election of remedies, *Gizoni's* "formal award rule," and the doctrine of equitable estoppel. This case was thus correctly decided by Judge Sorensen

(applying the formal award rule as dictated by the U.S. Supreme Court in *Gizoni*), and he should be affirmed.

B. STATEMENT OF THE ISSUES

1. Was Judge Sorensen correct to apply the U.S. Supreme Court's binding formal award rule, barring a subsequent Jones Act/general maritime action in LHWCA cases where the worker receives a formal award, to this case where the maritime worker not only received the requisite formal award at the conclusion of the adjudication of his LHWCA claim, but also entered into a settlement agreement with his employer, which was approved by the LHWCA adjudicator, and wherein the worker expressly stipulated that his claim falls within the jurisdiction of the LHWCA?

2. Does the election of remedies doctrine bar Gibson's Jones Act/general maritime action when he elected between two or more inconsistent but available remedies?

3. Is a maritime worker who enters into a settlement agreement with his employer, wherein he expressly contends that his injury is "covered under the Longshore Act" and stipulates that his "claim comes within the jurisdiction of the [LHWCA]," obtains approval of the settlement agreement by the LHWCA adjudicator and thus a formal award as required under *Gizoni*, equitably estopped from pursuing a second

action against his employer for the same injury?

C. STATEMENT OF THE CASE

1. Gibson Had Significant Pre-existing Conditions

Gibson sustained a left knee injury while serving in the military resulting in arthroscopic surgery. CP 29 (¶2). He sustained a neck injury in a motor vehicle accident, CP 69, which resulted in a fusion of the C6-7 vertebrae, a bulging disc at the C4-5 level, and caused upper extremity numbness and paresthesia. CP 29 (¶3). He also had chronic lumbar back pain. CP 29 (¶4).

2. Gibson Continued Working for Nine Months and then Filed for Compensation with the Assistance of Counsel

On August 8, 2013, while employed by American Construction Company, Inc. ("American"), as a mechanic, CP 29, Gibson fell through a hatch while working on a crane barge moored at American's office. He was treated at Tacoma General Hospital, CP 29, and returned to work at 7:00 a.m. the next day. CP 67.

American timely reported the injury to the DOL, CP 68, and Gibson continued his regular work duties for nine months. CP 10.

Although not in the record, while at Tacoma General, Gibson filed a worker's compensation claim with the Department of Labor and Industries, which claim was promptly rejected because the "injury

occurred while in the course of employment subject to federal jurisdiction (Longshore and Harbor Workers Compensation Act or Jones Act)."

Nine months later, in May 2014, Gibson stopped working and started collecting LHWCA benefits. CP 71. He had retained a maritime attorney, who then filed a formal Claim for Compensation. CP 70.

On or about December 17, 2015, after collecting benefits for over 18 months ($81,984.70 for temporary total disability, $45,000 for advance on compensation, and $64,841.48 for medical), Gibson filed an Application for Approval of Agreed Settlement. CP 28-39.

3. Gibson Settled and Expressly Stipulated to LHWCA Jurisdiction

In the Agreed Settlement, the parties expressly sought approval pursuant to Section 8(i) of the LHWCA (33 U.S.C. §908(i)). CP 28. A settlement approved under Section 8 discharges the employer's liability. 33 U.S.C. §908(i)(3).

The parties also represented that they adhered to the requirements of 20 C.F.R. §702.241-243. CP 28. Under 20 C.F.R. §702.242, a compliant settlement application need only address: (1) the amounts to be paid as compensation, medical benefits, and fees; (2) the reason for the settlement, "and the issues which are in dispute"; (3) the claimant's date of birth; (4) work status; (5) provide a current medical report; (6) a statement

regarding the adequacy of the settlement amount; (7) in some circumstances an itemization of medical expenses paid; and (8) information regarding any collateral source. 20 C.F.R. §702.242(b). Although not a requirement, Gibson nevertheless expressly addressed the issue of jurisdiction. CP 28 and 33.

Gibson's contention that "at no time did Gibson ever admit that his injury fell within the LHWCA," *Brief of Appellant*, p. 4, is blatantly false. In the Agreed Settlement, under "Statement of Factual Contentions," Gibson expressly made the following stipulation:

> Applicable Law. This claim comes within the jurisdiction of the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. §901, et seq.

CP 28.

Gibson then went one step further and affirmatively contended "a work related injury covered under the Longshore Act." CP 33.

The Agreed Settlement also addressed the adequacy of the settlement. The parties expressly agreed: "This settlement is adequate." CP 35. They further agreed "an amicable settlement [was] in the interest of all parties given the costs, delay and uncertainties associated with formal hearing and decision." CP 34. Finally, the Agreed Settlement provided that the "[e]mployer . . . will also resolve its liability under this claim," CP 34, and the settlement would "allow[] the parties to avoid the

time and risks associated with further litigation." CP 36.

Both Gibson and his attorney signed the Agreed Settlement on December 17, 2015. CP 38.

4. Gibson Secured a Formal Award (per *Gizoni*)

The LHWCA adjudicator formally approved the Agreed Settlement by formal Compensation Order dated December 22, 2015. CP 41-43.[1]

The Order establishes that any necessary further investigation had been made, and that, although available, neither party applied for a hearing, nor was a hearing deemed necessary. CP 41. The Order establishes that the adjudicator specifically considered "the probability of success if the case were formally litigated." *Id.*, *citing* 20 C.F.R. §702.243. Section 243(f) specifically obligates the adjudicator to consider the probability of success if the case were formally litigated, 20 C.F.R. §702.243(f), and the Order thus establishes this was accomplished. Finally, the Order establishes that it "effects a final disposition of the claim, discharging the liability of the employer and insurance carrier in accordance with the terms of the settlement." CP 41.[2]

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[1] The district director is by definition an "adjudicator." 20 C.F.R. §702.241.

[2] Gibson contends that this order was "essentially identical" to the order in *Figueroa v. Campbell Indus.*, 45 F.3d 311 (9th Cir. 1995), *Brief of Appellant*, p. 4, n. 4, but the *Figueroa* order is not in the record. Moreover, this unfounded

Thus, Gibson's contention that the issue of jurisdiction was never addressed or adjudicated by a judge or tribunal, *Brief of Appellant*, p. 4, is directly contradicted by the record. The Order expressly discharged American's liability in accordance with the terms of the Agreed Settlement, which expressly resolved the issue of jurisdiction. CP 28.[3]

Gibson secured a formal award of $500,000 new money for disability, $135,000 for future medical costs, $9,876.50 for attorney's fees, and $575.43 for litigation costs. CP 34-35.

5. Gibson Filed Suit under the Jones Act Seeking a Second Recovery for the Same Injury

Within weeks of entering into a binding settlement agreement with his employer and obtaining a formal award under the LHWCA, Gibson turned around and filed suit against his employer under the Jones Act and general maritime law, seeking a second recovery for the same injury. CP 1-8. Contrary to the express stipulation in his Agreed Settlement that his

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contention distracts from the fact that here there was an Agreed Settlement where Gibson expressly stipulated that his claim came within the jurisdiction of the LHWCA and further contended his claim was covered by the Longshore Act. CP 28 and 33. As discussed further in Section E. 2. (c), *infra*, this key fact distinguishes this case from *Figueroa* and warrants dismissal of Gibson's Jones Act/general maritime action consistent with Judge Sorensen's decision below.

[3] Gibson's argument that American never controverted Gibson's jurisdictional status, *Brief of Appellant*, p. 5, is nonsensical. There was nothing to controvert as Gibson contended he was covered under the LHWCA and in fact, stipulated to such jurisdiction. Likewise, the contention that American could have sought resolution of the Jones Act claim, *id.*, ignores the express language of the Agreed Settlement, specifically including the jurisdictional stipulation, which establishes jurisdiction under the LHWCA. There was nothing more to resolve.

claim came under the jurisdiction of the LHWCA and his further contention therein that his work related injury was covered under the Longshore Act, Gibson now claimed he was a seaman; and sought additional and duplicative damages from his employer for his settled injury, including past and future earnings, past and future medical expenses, general damages, prejudgment interest and maintenance and cure. CP 7.

6. Judge Sorensen Correctly Dismissed Gibson's Lawsuit as Barred by the Formal Award Rule in *Gizoni*, and the Doctrines of Election of Remedies and Estoppel

American moved to dismiss Gibson's Jones Act and general maritime unseaworthiness claims based on Gibson's express stipulation in the Agreed Settlement that his claim came under the LHWCA. CP 9-47.

The Honorable Phillip Sorensen initially heard oral argument on June 17, 2016, and denied American's motion to dismiss without findings or explanation, CP 86-89, but then expressly outlined the protocol for additional briefing and oral argument by way of a motion for reconsideration. RP 23. On July 29, 2016, CP 127-128, after hearing extensive arguments from both parties, the Court reconsidered and granted the motion, dismissing Gibson's Jones Act and general maritime claims, and making the following findings:

1. There are no genuine issues of material fact.

2. Plaintiff's claims asserted in his Complaint are barred by the election of remedies doctrine.
3. Plaintiff's claims asserted in his Complaint are barred by the doctrine of equitable estoppel.
4. Plaintiff waived any and all subsequent claims against Defendant for his August 8, 2013 injury by obtaining a formal award resolving his claims under the U.S. Longshore and Harbor Workers' Compensation Act.
5. Plaintiff failed to state a claim upon which relief can be granted.

CP 130.

D. SUMMARY OF ARGUMENT

Judge Sorenson should be affirmed. The record establishes beyond dispute that Gibson obtained the requisite *Gizoni* formal award and further that the parties not only stipulated that his injury claim came within the jurisdiction of the LHWCA but that this was also Gibson's express contention. Gibson's present contention that American never "raised" jurisdiction disregards the express stipulation in the Agreed Settlement. The formal order issued by the LHWCA adjudicator establishes that this matter was administratively adjudicated, with the right to a hearing waived; that jurisdiction was expressly resolved; and that the employer's liability for Gibson's injury claim was thereby extinguished. Gibson's Jones Act and general maritime claims are barred by his formal LHWCA award, his settlement, election of remedies, and estoppel.

E. ARGUMENT[4]

1. An Injured Maritime Worker Has Two Mutually Exclusive Compensation Regimes, the LHWCA and the Jones Act/General Maritime Law; a Maritime Worker Cannot Recover under Both

Gibson's remedies ultimately come down to an election between two mutually exclusive federal schemes. He is not entitled to compensation under the Washington Industrial Insurance Act. Title 51 Wash. Rev. Code (the Industrial Insurance Act), does "not apply to a master or member of a crew of any vessel, or to employers and workers for whom a right or obligation exists under the maritime laws or federal employees' compensation act for personal injuries or death of such workers." Wash. Rev. Code §51.12.100(1). Instead, such workers are

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[4] A motion to dismiss under CR 12(b)(6) questions the legal sufficiency of the allegations in a pleading. *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 742, 565 P.2d 1173 (1977). "The question under CR 12(b)(6) is basically a legal one, and the facts are considered only as a conceptual background for the legal determination." *Id.* (*citing Brown v. MacPherson's, Inc.*, 86 Wash. 2d 293, 298, 545 P.2d 13 (1975)). A trial court should grant a motion to dismiss pursuant to CR 12(b)(6) "if it appears beyond a reasonable doubt that no facts exist that would justify recovery." *Atchison v. Great Western Malting Co.*, 161 Wash. 2d 372, 376, 166 P.3d 662 (2007) (*en banc*) (*quoting Cutler v. Phillips Petroleum Co.*, 124 Wash. 2d 749, 755, 881 P.2d 216 (1994)); *Ottgen v. Clover Park Technical College*, 84 Wash. App. 214, 222, 928 P.2d 1119 (Div. 2, 1996) (affirming dismissal based on issue of law, namely entity's Consumer Protection Act exemption as complete bar to the plaintiff's claim).

Gibson erroneously contends that material outside the pleadings may not be submitted in support of a motion under CR 12(b)(6). *Brief of Appellant*, p. 7, fn. 8. Submission of "outside" materials merely converts the motion to one for summary judgment. *See* CR 12(b)(6). Indeed, Judge Sorenson in granting American's motion expressly found no genuine issues of material fact. CP 130.

covered either under the LHWCA, or the Jones Act and general maritime law.

These two schemes (the LHWCA and the Jones Act) are mutually exclusive, and distinguish between primarily land-based maritime workers and workers who are members of the crew of a vessel ("seamen"). *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355–56, 359, 115 S. Ct. 2172, 2183, 132 L. Ed. 2d 314 (1995) ("the Jones Act and the LHWCA are mutually exclusive compensation regimes . . . ."); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 353, 111 S. Ct. 807, 813, 112 L. Ed. 2d 866 (1991) ("[w]e now recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees."); *Thomas v. Gen. Const. Co.*, 4 Wash. App. 44, 48, 480 P.2d 241 (1971) ("The remedies in the two statutes are mutually exclusive. One applies to longshoremen and the other to seamen.")

There are both similarities and material inconsistencies between these remedies—there are no-fault benefits under both schemes, but only under the Jones Act/general maritime law may an employee sue his/her employer;[5] but the key feature is exclusivity. The LHWCA states that

[5] Immunity from suit, in exchange for no-fault benefits, is the policy under both the LHWCA, *see* 33 U.S.C. §905(a), and Washington's Industrial Insurance Act.

"[t]he liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . .," 33 U.S.C. §905(a) (emphasis added), and the U.S. Supreme Court has repeatedly confirmed that the LHWCA and seaman's remedies under the Jones Act and general maritime law are mutually exclusive; a worker cannot recover under both. *Chandris,* 515 U.S. at 355–56. Therefore, a maritime worker whose injury is covered by the LHWCA may only recover from his employer under the LHWCA. The employer cannot ultimately be held liable under both the LHWCA and the Jones Act or general maritime law. Indeed, under the facts of this case, permitting Gibson's Jones Act suit to proceed would violate the mutual exclusivity mandate, and render sections of the LHWCA meaningless. *See Gorman v. Garlock, Inc.*, 155 Wash. 2d 198, 210, 118 P.3d 311, 318 (2005) (*en banc*) ("'[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'") (*quoting Davis v. Dep't of Licensing*, 137 Wash. 2d 957, 963, 977 P.2d 554 (1999)).

See Wash. Rev. Code §51.32.010. Allowing suit against the employer when the worker has formally elected such a scheme is therefore contrary to public policy.

a. Mutual Exclusivity is Preserved by the "Offset Rule" During the Pendency of the Injury Claim

Whether a maritime worker is primarily land-based and should be covered under the LHWCA or sea-based and covered under the Jones Act and general maritime law is not always readily apparent at the outset of a claim. Furthermore, the LHWCA requires an employer to pay medical and wage loss benefits to an injured worker within 14 days of notice. 33 U.S.C. §914(b). To ensure compliance with the LHWCA, maritime employers often voluntarily pay LHWCA benefits immediately after a workplace injury regardless of the worker's proper classification.

In order to ensure that injured maritime workers receive prompt benefits while also preserving the mutual exclusivity of the two available remedies, Congress has provided that benefits paid under the Jones Act should be credited against any liability imposed under the LHWCA. *See* 33 U.S.C. §903(e). This "offset rule" thus allows the injured maritime worker to initially receive benefits under either scheme, medical and wage loss benefits under the LHWCA or a seaman's benefits in the form of maintenance and cure, with the requirement that once the worker elects his remedy the benefits received be offset so as to avoid double recovery, thus preserving mutual exclusivity.

Once the worker has elected his remedy and any offset for voluntary payments effected to avoid a double recovery, the offset rule has served its purpose. *See, e.g., Long v. Washington State Dep't of Labor & Indus.*, 174 Wash. App. 197, 207, 299 P.3d 657 (Div. 2, 2013), *as amended on reconsideration* (May 29, 2013); Wash. Rev. Code §51.12.102(1) (temporary benefits paid "until, the federal insurer initiates payments or benefits are otherwise properly terminated under the title") (internal quotation omitted). The rule should not be interpreted as providing a vehicle for a double recovery under the alternative scheme *after* the election and final resolution of the worker's injury claim. *See, e.g., Gorman*, 155 Wash. 2d at 208-209 ("The legislature's intent in excluding LHWCA-covered workers from the WIIA was 'to prevent double recovery by [such a] worker,' and thereby 'protect the state's industrial insurance fund when a worker is adequately covered under the LHWCA.'") (*citing Esparza v. Skyreach Equip., Inc.*, 103 Wash. App. 916, 938, 15 P.3d 188 (2000), *review denied)*, 144 Wash.2d 1004, 29 P.3d 718 (2001); *E.P. Paup Co. v. Director, Office of Workers Comp. Programs*, 999 F. 2d 1341, 1348 n. 3 (9th Cir. 1993)). As Congress and the U.S. Supreme Court were set against permitting recovery under both acts, it would fly in the face of reason to assume they would permit a

duplicative Jones Act suit after a full settlement and formal award resolving LHWCA claims, as Gibson has done here.

b. Gibson Elected the LHWCA Remedy, Settled, and Received a Formal Award; the Offset Rule did not Come into Play

Gibson collected the more generous LHWCA benefits for 18 months and then formally and expressly elected the LHWCA as his exclusive remedy. This is not a situation for which Congress and the courts fashioned the offset rule.

Gibson did not merely accept voluntary LHWCA payments and then elect to proceed with a lawsuit under the Jones Act and general maritime law, in which case an offset would be appropriate. Had Gibson elected to pursue seaman's remedies at any time during the 28 month pendency of his injury claim (before settlement and final award), his benefit payments ($81,984.70 for wage replacement, $64,841.48 for medical costs, and the $45,000 advance, CP 32) would have been offset against any benefits or recovery under the Jones Act or general maritime law. Instead, Gibson proactively pursued his LHWCA remedy. He retained counsel and: (1) submitted a Claim for Compensation to the DOL, CP 26; (2) pursued his LHWCA claims for 18 months without asserting any seaman's claims, CP 26; 32; (3) negotiated a substantial settlement ($635,000 new money, CP 34-35) with the assistance of counsel, CP 38

and 63; (4) prepared and signed a detailed Agreed Settlement, CP 28-39; (5) obtained full review by the LHWCA adjudicator and a formal award CP 41-43; and (6) received settlement funds covering disability, future medical costs and attorney's fees (awards far beyond LHWCA benefit payments). CP 26, 28-39, 41-43. Most importantly, he expressly stipulated in the Agreed Settlement, that "[T]his claim comes within the jurisdiction of the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. §901 *et seq*," CP 28, and also affirmatively contended his was a "work related injury covered under the Longshore Act." CP 33. Such facts indisputably remove Gibson from the scope of the offset rule.

After electing and recovering for his injury under the LHWCA, Gibson cannot re-litigate his injury as a "seaman" under the Jones Act and general maritime law. To permit such a suit would render the exclusivity provision of the LHWCA meaningless, and go against longstanding precedent of the U.S. Supreme Court. *See* 33 U.S.C. §905(a); *Chandris,* 515 U.S. at 355–56 ("the Jones Act and the LHWCA are mutually exclusive compensation regimes"); *McDermott,* 498 U.S. at 353 ("the LHWCA is one of a pair of mutually exclusive remedial statutes"); *see also Gorman*, 155 Wash. 2d at 210 ("'[s]tatutes must be interpreted and

construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'") (citation omitted).

2. Gibson's Jones Act Suit Is Barred by the "Formal Award Rule"[6]

Judge Sorenson applied *Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S. Ct. 486, 489-90, 116 L. Ed. 2d 405 (1991), the authority followed by the majority of federal circuits courts that have address the situation now facing this Court, directing that where, as here, a formal LHWCA award has been entered, the worker is barred from pursuing an action under the Jones Act. Indeed, this "formal award rule" adheres to Congress's exclusivity provision in the LHWCA and is consistent with the doctrine of election of remedies. Judge Sorensen should be affirmed.

a. The Only Binding Authority – *Gizoni* (1991) – Dictates that Gibson's Jones Act Suit Is Barred By His Settlement and Formal Award Under the LHWCA

The only binding authority on this issue is the U.S. Supreme Court's decision in *Sw. Marine, Inc. v. Gizoni,* 502 U.S. 81, 112 S. Ct. 486, 489-90, 116 L. Ed. 2d 405 (1991). Therein the Court articulated what has since become known as the formal award rule, although the Court addressed a different factual situation than that presented by this case.

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[6] Although state courts have jurisdiction, maritime "suits are governed by substantive federal maritime law." *Endicott v. Icicle Seafoods, Inc.*, 167 Wash. 2d 873, 879, 224 P.3d 761 (2010) (*citing Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10, 74 S. Ct. 202, 98 L. Ed. 143 (1953)).

Specifically, *Gizoni* addressed seaman status primarily and the exclusivity bar implicated by the worker's election of remedies secondarily. Moreover, in *Gizoni* the claimant only received voluntary benefit payments before he sued his employer under the Jones Act—there was no settlement, jurisdictional resolution, or formal award as is the case here.

Gizoni was a rigging foreman injured on a floating platform. *Gizoni,* 502 U.S. at 84. After merely receiving voluntary LHWCA benefit payments, he sued his employer under the Jones Act. *Id.* The trial court dismissed on summary judgment, finding Gizoni was not a seaman as a matter of law because the floating platforms at issue were not "vessels in navigation," as required for Jones Act jurisdiction. *Id.* The Ninth Circuit reversed, finding an issue of fact, *id.* at 85, and the U.S. Supreme Court affirmed. *Id.* at 92.[7]

After addressing the primary issue, the Court turned briefly to the employer's argument that Gizoni's seaman's claims were barred due to Gizoni's receipt of voluntary LHWCA benefit payments. *Id.* at 91. The Court acknowledged that the LHWCA and the Jones Act (the seaman's

[7] To qualify as a seaman, a worker must show that: (1) his duties contributed to the function of the vessel or accomplishment of its mission; and (2) he had a connection to a vessel in navigation that was substantial in both nature and duration. *Chandris,* 515 U.S. at 368. This is not the issue before this Court. Here Gibson stipulated to jurisdiction under the LHWCA, and the issue is whether Gibson's election, stipulation, settlement, and formal award bar his Jones Act/general maritime action.

remedy) are mutually exclusive per 33 U.S.C. §905(a). *Gizoni,* 502 U.S. at 86-88. In explaining the law on this issue, the Court stated: "It is by now 'universally accepted' that an employee who receives voluntary payments under the LHWCA **without a formal award** is not barred from subsequently seeking relief under the Jones Act." *Id.* at 91 (emphasis added) (*citing* G. Gilmore & C. Black, *Law of Admiralty* 435 (2d ed. 1975); 4 A. Larson, *Workmen's Compensation Law* § 90.51, p. 16–507 (1989) (collecting cases); *Simms v. Valley Line Co.*, 709 F.2d 409, 412, and nn. 3 and 5 (5th Cir. 1983)).[8] As Gizoni merely received voluntary LHWCA benefit payments and did not obtain a formal award, *Gizoni,* 502 U.S. at 84, the Court indicated he would not be barred from seeking relief

[8] *Simms* did not reach the issue due to a pending administrative appeal. *Simms*, 709 F.2d at 410. Nevertheless, in *Simms* the Fifth Circuit acknowledged that "the plaintiff who attempts to bring a Jones Act action following a compensation award in a contested proceeding may find himself barred in a court which takes *res judicata* and collateral estoppel seriously." *Id.*, at 412, fn. 5 (*citing* Gilmore & Black, *supra,* at 435). Indeed, Gilmore & Black cited *Hagens v. United Fruit Co.*, 135 F.2d 842 (2d Cir. 1943), in which the Second Circuit held that an award under the LHWCA barred a subsequent suit under the Jones act. *Id.* at 843. Notably, *Hagens* rejected the argument that an express finding of non-seaman status was required before the award would serve as a bar. *Hagens* held "that there is a presumption of jurisdiction unless the absence of jurisdiction affirmatively appears on the face of the record, as it does not here." *Id.* Here, Gibson expressly stipulated to jurisdiction. CP 28. As discussed further below, after *Gizoni*, Fifth Circuit directly considered the issue and held that a settlement agreement and Compensation Order resolving an injury claim constituted a formal award and barred a subsequent lawsuit seeking a seaman's remedies. *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992).

under the Jones Act, assuming he qualified as a seaman. *Gizoni,* 502 U.S. at 91-92.

The facts of this case dictate the opposite result. Here, Gibson settled his LHWCA claim with a jurisdictional stipulation, thus formally electing LHWCA remedies, *and* obtained a formal award. Indeed, by incorporation of the Agreed Settlement, the Order issued by the LHWCA adjudicator establishes that this matter was administratively adjudicated, with the right to a hearing waived; that jurisdiction was expressly resolved; the probability of success if the case were formally litigated considered; and that the employer's liability for Gibson's injury claim was thereby extinguished. CP 41. Applying the formal award rule from *Gizoni*, the trial court correctly barred Gibson's Jones Act/general maritime action.

Notably, the trial court's decision follows the majority. After the *Gizoni* decision dictated that receipt of a formal award under the LHWCA would bar subsequent seaman's claims, the majority of federal circuits to address the issue have applied this as the "formal award rule." *E.g. Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, 425-26 (5th Cir. 1992); *Reyes v. Delta Dallas Alpha Corp.*, 199 F.3d 626, 629 (2d Cir. 1999); *Polak v. Riverside Marine Const., Inc.*, 22 F. Supp. 3d 109, 121 (D. Mass. 2014), *appeal dismissed* (Nov. 26, 2014).

b. The Fifth Circuit Follows the Formal Award Rule and Would thus Bar Gibson's Lawsuit – *Sharp* (1992)

The year after *Gizoni*, the Fifth Circuit applied the *Gizoni* formal award rule in deciding a case analogous to the one at bar. *See Sharp,* 973 F.2d at 425-26. Sharp was a welder/pile driver injured while helping to replace a railroad drawbridge over Lake Pontchartrain. *Id.* at 424. Sharp pursued both LHWCA and seaman's claims, eventually obtaining a settlement under the LHWCA. *Id.* The DOL approved the settlement with a Compensation Order, discharging the employer's liability. *Id.* at 424; 426. The district court dismissed the seaman's suit, holding that Sharp elected the LHWCA as his remedy, precluding the seaman's remedy. *Id.* at 424. The Fifth Circuit affirmed, highlighting the significance of the formal award as noted in *Gizoni*: Sharp *received* a formal award, and was therefore barred from pursuing the seaman's remedy; Gizoni did *not* receive a formal award, and could therefore elect to pursue a seaman's remedy, *id.* at 426, assuming he could prove seaman status, which remained an issue of fact in *Gizoni.*

Notably, the Fifth Circuit in *Sharp* also addressed the argument raised by Gibson here that his LHWCA coverage was not litigated in an adversarial proceeding. The Court rejected this argument, explaining that "Sharp availed himself of the statutory machinery to bargain for an award,

and he had the full opportunity to argue for (or against) coverage . . . [and] filed a claim for LHWCA benefits, invoking the jurisdiction of the DOL." *Sharp,* 973 F.2d at 426. Full participation in the administrative adjudication to an agreed resolution thus provides equivalent protections as may be afforded in adversarial litigation through the courts. Indeed, to hold otherwise would defeat the purpose of the adjudicate process established by the LHWCA, as well as work unfairness. *Id.* at 427.

c. The Ninth Circuit – *Figueroa* (1995) – Is the Outlier, Having Ignored the Formal Award Rule in *Gizoni*, but Nevertheless Supports Dismissal of Gibson's Jones Act Suit Based on His Jurisdictional Stipulation[9]

In *Figueroa v. Campbell Indus.*, 45 F.3d 311 (9th Cir. 1995), the Ninth Circuit permitted a Jones Act suit *after* the worker settled his LHWCA claim. In doing so, the Ninth Circuit (District Judge J. Quackenbush of the Eastern District of Washington, sitting by designation), dismissed the significance of a formal award; erroneously analogized its facts to the *Gizoni* facts thus failing to distinguishing the

[9] The Ninth Circuit considered the issue again a few months later, in *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203 (9th Cir. 1995) (opinion by District Judge R. Takasugi of the Central District of California, sitting by designation), *rev'd on other grounds*, 520 U.S. 548, 117 S. Ct. 1535, 137 L. Ed. 2d 800 (1997) (the U.S. Supreme Court did not reach the issue at bar), and reached the same result as in *Figueroa* but for different reasons. *Id.* at n. 6. However, in *Papai*, the worker was already pursuing his Jones Act suit when he sought LHWCA benefits, and continued the prosecution of his Jones Act suit throughout and following the adjudication of his LHWCA claim. *Id.* at 205. Unlike Gibson, the worker in *Papai* never conceded or stipulated to jurisdiction under the LHWCA. *Id.*

fact that Gizoni never settled or received a formal award, *Figueroa*, 45 F.3d 311 at 314; neglected to consider the post-*Gizoni* Fifth Circuit decision in *Sharp*, opting instead to rely on an outdated 1965 district court case from the Fifth Circuit and a distinguishable Fourth Circuit case from 1966; and neglected to consider the election of remedies doctrine. [10]

In the district court case from the Fifth Circuit, *Guidry v. Ocean Drilling & Expl. Co.*, 244 F. Supp. 691 (W.D. La. 1965), the Court held a seaman's suit was not barred by an award under the LHWCA, because the LHWCA Deputy Commissioner's findings did "not disclose any facts upon which his jurisdiction existed." *Id.* at 692. The Court reasoned that if jurisdiction had been sufficiently addressed then the rule of *Hagens v. United Fruit Co.*, 135 F.2d 842 (2d Cir. 1943), would apply and the Jones

[10] The U.S. Supreme Court's *Gizoni* decision, *i.e.*, the formal award rule applied by Judge Sorensen in this case, is binding on this Court. The Ninth Circuit is merely persuasive authority. *See Johnson v. Williams*, -- U.S. --, 133 S. Ct. 1088, 1098, 185 L. Ed. 2d 105 (2013) (reversing the Ninth Circuit, stating that "the views of the federal courts of appeals do not bind the California Supreme Court when it decides a federal constitutional question," and disagreeing with the lower federal courts is not the same as ignoring federal law); *Lockhart v. Fretwell*, 506 U.S. 364, 376, 113 S. Ct. 838, 846, 122 L. Ed. 2d 180 (1993) (Thomas, J., concurring) ("In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."); *Lundborg v. Keystone Shipping Co.*, 138 Wash. 2d 658, 665-670, 981 P.2d 854 (Wash. 1999) (*en banc*) (with the federal courts divided on a federal maritime issue, Washington declined to follow the Ninth Circuit in favor of the Third Circuit); *State v. Ballew*, 167 Wash. App. 359, 369, 272 P.3d 925 (2012) (with a split among federal circuits, court stated "We are not bound by these circuit courts, and the U.S. Supreme Court has not chosen to resolve this conflict within the circuits. Therefore, we continue to follow the law, as stated by the state supreme court.").

Act suit would be barred. *Guidry,* 244 F. Supp. at 692. As stated at page 20, n. 8, in *Hagens* the Second Circuit held that an award under the LHWCA barred a subsequent suit under the Jones act, *Hagens*, 135 F.2d at 843, and held "there is a presumption of jurisdiction unless the absence of jurisdiction affirmatively appears on the face of the record, as it does not here." *Id.*

Here, Gibson expressly stipulated to jurisdiction in an Agreed Settlement, CP 28, which was then approved by the LHWCA adjudicator by way of a formal award. CP 41.

Although the district court's decision in *Guidry* supports Judge Sorensen's decision to dismiss the Jones Act/general maritime action in this case on the alternative ground that Gibson expressly stipulated to jurisdiction as part of his settlement, as discussed above in Section E. 2. b., the rule in the Fifth Circuit is the *Gizoni* formal award rule, holding that a settlement agreement and compensation order constitute a formal award barring subsequent seaman's claims. *Sharp*, 973 F.2d at 427; *see also Anders v. Ormet Corp.*, 874 F. Supp. 738, 741 (M.D. La. 1994) ("Under a *Gizoni* analysis, the question then becomes whether Anders has been issued a formal award.").

The 1966 Fourth Circuit case cited in *Figueroa* is factually distinguishable. In *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir.

1966), both plaintiffs merely received compensation payments, *id.* at 365, which the Court clarified as "benefits provided" under state workers' compensation and LHWCA. *Biggs*, 360 F.2d at 361. The plaintiffs did not settle or otherwise resolve their claims. In fact, one plaintiff formally disputed his employment status in writing, stating that his LHWCA claim "'should not in any way be construed as a waiver, a estoppel [*sic*], or any relinquishment whatever'" of seaman's remedies. *Id.* at 363.[11]

Significantly, despite its minority interpretation of both the law and the facts in Gizoni, *Figueroa* does not support reversing Judge Sorensen's decision dismissing Gibson's Jones Act suit as Gibson contends. To the contrary, like the outdated *Guidry* case, *Figueroa* directs that where the jurisdictional issue *is* addressed at the administrative level, which it was in Gibson's case, the worker is estopped from bringing a Jones Act claim. A key distinguishing finding in *Figueroa* was the failure in that case to

[11] Notably, after *Biggs*, but before *Figueroa*, the Fourth Circuit considered a similar situation, in which the claimant received benefits before and after filing suit for liability under the Federal Tort Claims Act (FTCA), and allowed the liability action to proceed in the absence of "evidence of conscious intent to elect the compensation remedy . . . ." *Martin v. U.S.*, 566 F.2d 895, 898 (4th Cir. 1977). The Court relied on the same workmen's compensation treatise cited in *Gizoni*, *see Gizoni,* 502 U.S. at 91, and stated that "'(m)ere acceptance of some compensation benefits, then, is not enough to constitute an election. There must also be evidence of conscious intent to elect the compensation remedy and to waive his other rights." *Martin*, 566 F.2d at 898 (*quoting* 2A Larson, *Workmen's Compensation*, § 67.22, at 12-52 to 12-53). The *Martin* decision confirms that the Fourth Circuit does not bar a seaman's claim after mere receipt of LHWCA benefits, but will do so when, as here, there is "evidence of conscious intent to elect the compensation remedy . . . ." *Id.* at 898.

address the jurisdictional issue in the LHWCA award: "However, here, just as in *Gizoni*, the jurisdictional issue was not previously litigated, and no finding in that regard was made at the administrative level. This is evidenced by the Compensation Order issued by the Department of Labor which makes findings of fact, none of them regarding the jurisdictional issue." *Figueroa*, 45 F.3d at 315-316.

Here, to the contrary, Gibson expressly stipulated to jurisdiction. In the Agreed Settlement, under "Statement of Factual Contentions," Gibson expressly made the following stipulation:

> Applicable Law. This claim comes within the jurisdiction of the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. §901 et seq.

CP 28.

Gibson then went one step further and affirmatively contended "a work related injury covered under the Longshore Act." CP 33. The issue of jurisdiction was expressly resolved in the Agreed Settlement and formal award, and Gibson's Jones Act suit should therefore be dismissed even under *Figueroa*. [12]

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[12] Notably, after *Figueroa,* the U.S. Supreme reaffirmed the mutual exclusivity of the LHWCA and Jones Act, explaining that "[w]ith the passage of the LHWCA, Congress established a clear distinction between land-based and sea-based maritime workers." *Chandris*, 515 U.S. at 359 (*quoting McDermott*, 498 U.S. at 347).

d. The Second Circuit Follows the Formal Award Rule and Would thus Bar Gibson's Lawsuit – *Reyes* (1999)

The Second Circuit was next to address the issue, after the Fifth and Ninth Circuits, and applied the *Gizoni* formal award rule, establishing it as the majority rule among the federal circuits. *See Reyes,* 199 F.3d at 628-629 (finding *Gizoni* "instructive as to the circumstances under which a seaman will have been deemed to have waived his Jones Act claims as a matter of federal law."); *see also In re Bridge Const. Servs. of Florida, Inc.*, 39 F. Supp. 3d 373, 391 (S.D.N.Y. 2014) ("the receipt of a formal award under the LHWCA would be inconsistent with a claim under the Jones Act.").

In *Reyes*, the worker, without settling or otherwise resolving his state workers' compensation claim, filed suit for seaman's remedies under the Jones Act and general maritime law. *Reyes*, 199 F.3d at 628. Applying the *Gizoni* formal award rule, the Court held that "mere receipt of interim compensation payments" without a "formal award settling the matter" did not bar the seaman's claims. *Id.* at 629. Conversely, where, as here, the worker enters into a settlement and obtains a formal award, he *is* barred from pursuing a seaman's remedies and any suit under the Jones Act and/or general maritime law should be dismissed.

e. In the Fourth Circuit the Election of Remedies Doctrine and/or Formal Award Rule Would Bar Gibson's Lawsuit – *Artis* (2000)

The Fourth Circuit was next to address the issue, albeit in the context of a LHWCA claim asserted after settlement of a suit under the Federal Employers' Liability Act ("FELA"). *See Artis v. Norfolk & W. Ry. Co.*, 204 F.3d 141, 143 (4th Cir. 2000). Although FELA is not a seaman's remedy, "the Jones Act adopts 'the entire judicially developed doctrine of liability' under the Federal Employers' Liability Act (FELA)." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 456, 114 S. Ct. 981, 989, 127 L. Ed. 2d 285 (1994) (*quoting Kernan v. Am. Dredging Co.*, 355 U.S. 426, 439, 78 S. Ct. 394, 401, 2 L. Ed. 2d 382 (1958) *see also Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 428, 129 S. Ct. 2561, 2577, 174 L. Ed. 2d 382 (2009) ("Congress incorporated FELA unaltered into the Jones Act").

In *Artis*, the worker filed suit under FELA, settled his claim, and then filed a LHWCA claim for the same injury. *Artis*, 204 F.3d at 143. The Fourth Circuit considered the exclusivity of the LHWCA, the election of remedies doctrine, and case law, and noted "[t]his court has never held that a worker may pursue an LHWCA remedy after obtaining a remedy under FELA." *Id.* at 144. The Court listed the following reasons for barring the LHWCA claim after the election of FELA remedies: (1) the claims were for the same injury arising from the same facts; (2) recovery

under FELA and the LHWCA "rest on different substantive theories, the first on negligence, the second on a workers' compensation statute based on liability without fault;" (3) the worker followed circuit precedent under FELA to sue and obtain settlement from the railway; and (4) permitting both the FELA suit and the LHWCA claim would permit double recovery for the same injury. *Artis*, 204 F.3d at 146. Finally, the Court explained that "[t]o permit an LHWCA claim subsequent to an FELA recovery . . . would ignore the LHWCA provision providing that it is the exclusive remedy against employers for injuries suffered by maritime workers." *Id.* at 144; *see also Norfolk S. Ry. Co. v. Wilson*, 7 F. App'x 156, 157 (4th Cir. 2001) (unpublished) (doctrine of election of remedies barred LHWCA claim after worker settled FELA claims). The Fourth Circuit thus applied the doctrine of election of remedies to reach the same result as under the formal award rule.

More recently, a Fourth Circuit district court explicitly applied the *Gizoni* formal award rule, explaining that "the Supreme Court held that the receipt of voluntary worker's compensation payments under the LHWCA does not bar a subsequent action under the Jones Act, unless the claimant received a formal award from the compensation board settling his claims in their entirety." *Cockerham v. Great Lakes Dredge & Dock Co.*, No. 7:06-CV-184-F, 2008 WL 313607 (E.D.N.C. Feb. 4, 2008) (emphasis

added). Thus, the Fourth Circuit joins the Second and Fifth Circuits in their majority application of *Gizoni's* formal award rule.

f. The First Circuit Courts Follows the Formal Award Rule and Would thus Bar Gibson's Lawsuit – *Polak* (2014)

In the First Circuit this matter has only been addressed at the district court level. However, the courts to consider the issue have applied *Gizoni* to bar a Jones Act suit where a worker received a formal award resolving his workers' compensation claim. *Polak*, 22 F. Supp. 3d at 121 (settlement agreement for workers' compensation claim approved by the state board barred Jones Act suit); *see also Vilanova v. United States*, 851 F.2d 1, 3 (1st Cir. 1988) (pre-*Gizoni*; barring FTCA suit because worker settled LHWCA claims and obtained DOL approval).

In *Polak*, the worker filed and settled a claim for state workers' compensation benefits, without disputing jurisdiction. *Polak*, 22 F. Supp. 3d at 112. The Maine Workers' Compensation Board issued a Consent Decree approving the settlement. *Id.* The worker then filed suit for seaman's remedies under the Jones Act and general maritime law. *Id.* After carefully considering the U.S. Supreme Court's *Gizoni*, the Fifth Circuit's *Sharp*, and the Ninth Circuit's *Figueroa*, the Court concluded the suit was barred, reasoning as follows:

> this court finds that [sic] Fifth Circuit's reasoning is particularly compelling in the instant case because Polak claimed benefits under a statutory scheme that specifically excluded coverage for persons engaged in maritime employment who fall within the exclusive jurisdiction of the laws of the United States. By doing so, he effectively took the position that he was not a Jones Act seaman, a position that was ratified by the Board's issuance of a Consent Decree confirming his eligibility for benefits under the Maine workers' compensation law. Because Riverside did not contend that Polak fell within the exclusion for maritime workers, there was no reason for the parties to litigate the issue of his seaman status. Indeed, the fact that Polak did not file his complaint in this case until July 2, 2012, nearly a year after the Board approved the parties' Consent Decree, meant that Riverside had no indication that Polak's status may have been in question at any point that was relevant to the workers' compensation dispute.

Polak, 22 F. Supp. 3d at 124.

In sum, the Second, Fourth and Fifth Circuits, and likely the First, directly apply the *Gizoni* formal award rule or apply the same reasoning under the election of remedies doctrine to bar a Jones Act/general maritime action under the facts of the case at bar. *See Polak*, 22 F. Supp. 3d at 121 (*Gizoni* formal award rule bars seaman's suit after settlement of state workers' compensation claim); *Reyes*, 199 F.3d at 629 (applying *Gizoni* formal award rule to permit seaman's suit after mere receipt of state workers' compensation claim because worker did not settle his claim); *Artis*, 204 F.3d at 146 (doctrine of election of remedies bars LHWCA claim after settlement of FELA suit); *Sharp*, 973 F.2d at 425-26

(*Gizoni* formal award rule and election of remedies doctrine bar seaman's suit after settlement of LHWCA claim).

While the Ninth Circuit interpreted the *Gizoni* decision differently, stretching the U.S. Supreme Court's opinion to skirt the formal award rule and the election of remedies doctrine, while also ignoring the differing and determinative facts (Figueroa settled, Gizoni did not), its recognition that express resolution of the jurisdictional issue would bar a subsequent Jones Act suit yields the same outcome in this case. Gibson received a formal award, CP 41 (barring Jones Act action under U.S. Supreme Court, First, Second, Fourth, and Fifth Circuit authority), and expressly stipulated to jurisdiction, CP 28 (barring Jones Act action under Ninth Circuit authority).

g. Washington State Enforces the Exclusivity of Longshore and Seamen's Remedies

Washington State enforces the mutual exclusivity of longshore and seaman's remedies with an offset rule when a worker receives temporary interim benefits under state law. Such jurisprudence indicates that Washington will also utilize the *Gizoni* formal award rule to preserve mutual exclusivity.

The Washington Industrial Insurance Act ("WIIA") provides the exclusive remedy for workers injured on the job, but expressly does not

apply to seamen or longshoremen. Wash. Rev. Code §§51.04.010; 51.12.100(1); *see also Gorman*, 155 Wash. 2d at 206 (under the LHWCA exclusivity provision, "an injured LHWCA-covered worker . . . is precluded from maintaining a suit at law against the employer."). "The legislature's intent in excluding LHWCA-covered workers from the WIIA was 'to prevent double recovery by [such a] worker,'" *Gorman*, 155 Wash. 2d at 208, much like the LHWCA offset rule. The only exception relates to "limited temporary, interim benefits . . ." stemming from an asbestos related illness. *Gorman*, 155 Wash. 2d at 211. These interim benefits are a stopgap to ensure the ill worker is covered "until" the worker receives benefits under the LHWCA or general maritime law. *Long*, 174 Wash. App. at 207; Wash. Rev. Code §51.12.102(1); 16 Wash. Prac., Tort Law And Practice § 1:7 (4th ed.). This exception does not provide for full recovery under the WIIA, but simply allows an injured worker to receive temporary payments which are later repaid once federal benefits begin, thereby preserving the exclusivity of the LHWCA. *See Olsen v. Washington State Dep't of Labor & Indus.*, 161 Wash. App. 443, 450–51, 250 P.3d 158 (2011) (benefits awarded under Wash. Rev. Code §51.12.102(1) are "temporary" and paid "until, the federal insurer initiates payments or benefits are otherwise properly terminated under the title." (internal quotation omitted)).

Accordingly, Washington enforces the exclusivity provision of the LHWCA. Indeed, the WIIA provides its own offset rule, requiring a worker who recovers under the LHWCA, Jones Act or general maritime law to repay any duplicative benefit payments paid under the WIIA. Wash. Rev. Code §51.12.100(4); *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1403 (9th Cir. 1994). Thus, in Washington State, the strong judicial support for the election of remedies doctrine and the imposition of an offset rule to ensure exclusivity of longshore and seaman's remedies indicates that settlement of one will bar the pursuit of the other. While Washington courts are silent on whether receipt of a workers' compensation settlement and/or formal award is an election of remedies barring seaman's claims, this Court should follow U.S. Supreme Court's *Gizoni* decision as binding authority on this issue and affirm Judge Sorensen's application of the formal award rule to bar the Jones Act/general maritime action in this case.

Moreover, consistent with Washington State's policy of enforcing exclusivity, the formal award rule follows Congress's exclusivity requirement by barring seaman's remedies after a worker goes beyond merely receiving LHWCA benefit payments and obtains a formal award resolving his LHWCA claim. *See* 33 U.S.C. §905(a) (The LHWCA is "exclusive and in place of all other liability of such employer to the

employee . . . ."); *Chandris*, 515 U.S. at 355–56 (the Jones Act and the LHWCA are mutually exclusive compensation regimes . . . ."). Permitting Gibson's Jones Act suit after he settled his LHWCA claim and obtained a formal award would violate fundamental rules governing statutory interpretation by rendering the exclusivity provision of the LHWCA meaningless. *See Gorman*, 155 Wash. 2d at 210 ("'[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'") (citation omitted).

Permitting such a suit, under the circumstances of this case, would also offend the employer immunity policy fundamental to workers' compensation schemes. Immunity from suit, in exchange for no-fault benefits, is the policy underlying both the LHWCA, *see* 33 U.S.C. §905(a), and WIIA. *See* Wash. Rev. Code §51.32.010. Allowing suit against the employer when the worker has formally elected such a scheme and received full compensation thereunder is therefore contrary to public policy.

3. The Election of Remedies Doctrine Bars Gibson's Jones Act/General Maritime Action

a. Gibson's Election of the LHWCA Remedy as Opposed to the Inconsistent Seaman's Remedies Available under the Jones Act/General Maritime Law Bars His Jones Act/General Maritime Law Action

As indicated by the Fourth Circuit's decision in *Artis*, 204 F.3d 141, the election of remedies doctrine of is an alternative bar to Gibson's Jones Act/general maritime action. "A party will be held bound by an election of remedies" when three elements are present:

> [i.] Two or more remedies must exist at the time of the election; [ii.] the remedies must be repugnant and inconsistent with each other; and [iii.] the party to be bound must have chosen one of them.

Birchler v. Castello Land Co., 133 Wash. 2d 106, 112, 942 P.2d 968 (1997) ("The purpose of the doctrine of election of remedies is to prevent a double redress for a single wrong.") (*quoting Lange v. Town of Woodway*, 79 Wash. 2d 45, 49, 483 P.2d 116 (1971)). Here, all three elements are indisputably satisfied.

i. There Existed Two or More Remedies at the Time Gibson Made His Election

There can be no dispute that, following his injury, Gibson had the option to pursue benefits under the LHWCA or under the Jones Act/ general maritime law. He expressly elected the LHWCA remedy. CP 28.

ii. The Two Remedies Are Repugnant and Inconsistent with Each Other

Congress has explicitly stated that LHWCA employer liability "shall be exclusive and in place of all other liability of such employer to the employee . . . ." 33 U.S.C. §905(a). The U.S. Supreme Court has repeatedly confirmed that the LHWCA and seamen's remedies under the Jones Act and general maritime law are mutually exclusive; a worker cannot recover under both. *Chandris*, 515 U.S. at 355–56 ("the Jones Act and the LHWCA are mutually exclusive compensation regimes"); *McDermott*, 498 U.S. at 353 ("the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees"); *see also Gorman*, 155 Wash. 2d at 206 (under the LHWCA exclusivity provision, "an injured LHWCA-covered worker . . . is precluded from maintaining a suit at law against the employer."). Indeed, the election of remedies doctrine "refers to situations where an individual pursues remedies that are legally or factually inconsistent." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49, 94 S. Ct. 1011, 1020, 39 L. Ed. 2d 147 (1974); *see also Labor Hall Ass'n v. Danielsen*, 24 Wash. 2d 75, 84, 163 P.2d 167 (1945) ("the pursuit of one necessarily involves or implies the negation of the other").

iii. Gibson Expressly and Formally Elected the LHWCA

Gibson entered into an Agreed Settlement in which, under

"Statement of Factual Contentions," Gibson expressly made the following stipulation:

> Applicable Law. This claim comes within the jurisdiction of the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. §901 et seq.

CP 28.

Gibson then went one step further and affirmatively contended "a work related injury covered under the Longshore Act." CP 33.

Gibson and his attorney signed the Agreed Settlement, and Gibson received settlement funds in the amount of $635,000 new money. CP 34-35; 38. This settlement went beyond wage replacement and medical expenses incurred; rather, it included disability, future medical, attorney's fees and litigation costs. CP 35.

Further formalizing his election, Gibson sought and received a formal award, approving his settlement. CP 41-43. Under these facts, it cannot reasonably be disputed that Gibson elected LHWCA remedies, thus barring a subsequent Jones Act/general maritime action. *See, e.g., Artis*, 204 F.3d at 146 (election of remedies barred LHWCA claim after railroad worker settled his claim under the Federal Employers' Liability Act); *Powers v. Bethlehem Steel Corp.*, 343 F. Supp. 17, 21 (D. Mass. 1972), *aff'd*, 477 F.2d 643 (1st Cir. 1973) (worker who filed LHWCA claim and

obtained award, "made what Congress has ordained to be a binding election among possible remedies").

b. The Election of Remedies Doctrine is Consistent with Washington State Policy and Practice

Washington State applies the election of remedies doctrine to workers who receive benefits under its workers' compensation laws and subsequently seek a seaman's remedies. In *Garrisey v. Westshore Marina Associates*, 2 Wash. App. 718, 719, 469 P.2d 590, 594-95 (1970), the worker filed a claim for workers' compensation benefits, received time loss, medical, and total temporary disability benefits, and then filed suit under the Jones Act and general maritime law. *Id.* at 719-720. In deciding whether employment came under state workers' compensation or federal remedies, the Court explained that the worker would be "bound by his election as to coverage both by the statute making the remedy exclusive and by the doctrine of election . . . .," and therefore held him "bound by the Industrial Insurance Act remedy he had elected." *Id.* at 724-727; *see also Gorman*, 155 Wash. 2d at 219 (affirming CR 12(b)(6) dismissal of claims asserted under Washington State workers' compensation laws, because claimants came under the LHWCA and were barred from asserting state claims by the LHWCA exclusivity provision); *Anderson v. Allison*, 12 Wash. 2d 487, 122 P.2d 484 (1942)

(longshoreman who received award under LHWCA elected his remedy and was barred from liability suit against his physician for malpractice); *see also Mooney v. City of New York*, 219 F.3d 123, 129 (2d Cir. 2000) (maritime worker elected state compensation benefits, waiving potential seaman's claims under the Jones Act and general maritime law).

In sum, Gibson had two inconsistent remedial avenues available to him and expressly elected the LHWCA remedy, which after completing the administrative adjudication and waiving his right to a hearing, he fully resolved with an Agreed Settlement and formal ward. Therefore, the election of remedies doctrine bars Gibson's Jones Act/general maritime action based on the same injury.

4. Gibson is Estopped from Bringing a Jones Act/General Maritime Law Action

Equitable estoppel bars a claim when the evidence shows there was "'(1) an admission, statement or act inconsistent with a claim later asserted; (2) reasonable reliance on that admission, statement, or act by the other party; and (3) injury to the relying party if the court permits the first party to contradict or repudiate the admission, statement or act.'" *Schroeder v. Excelsior Mgmt. Grp.*, LLC, 177 Wash. 2d 94, 108-09, 297 P.3d 677 (2013) (*quoting State, Dep't of Ecology v. Theodoratus*, 135 Wash. 2d 582, 957 P.2d 1241 (1998)); *see also Keller Found./Case*

Found. v. Tracy, 696 F.3d 835, 847 (9th Cir. 2012) (noting the Court's prior application of equitable estoppel to LHWCA and seaman's cases, and explaining the doctrine "prevents a party from asserting a strict legal right after another party has been led to form a reasonable belief that the right would not be asserted. In this sense, equitable estoppel functions as a 'shield'") (citation omitted); *Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116, 1124 (9th Cir. 2006) (finding trial court did not abuse discretion in equitable estoppel determination in seaman's suit for personal injury under the Jones Act and general maritime law); *Gibbs ex rel. Gibbs v. Carnival Cruise Lines*, 314 F.3d 125, 133 (3d Cir. 2002) (equitable estoppel "is designed to aid the law in the administration of justice where without its aid injustice might result").

Here the record establishes beyond dispute that: (1) Gibson stipulated that his injury came under the jurisdiction of the LHWCA, CP 28 and 33, and that he now inconsistently claims seaman status by way of a Jones Act suit; (2) American reasonably relied on Gibson's jurisdictional stipulation and election of remedies in settling the injury claim in exchange for release of any possible future claims, CP 44-45; and (3) if Gibson's duplicative suit for the same injury is allowed, American will be irreparably injured by the high costs of litigation required to defend itself, for the second time. The elements of equitable estoppel are indisputably

satisfied in this case. Therefore, independent of the election of remedies doctrine and formal award rule, Gibson is equitably estopped from bringing his Jones Act/general maritime action claiming a status and entitlement inconsistent with his prior stipulation.

Gibson's contrary contentions lack merit. Gibson contends *Gizoni*'s rejection of an equitable estoppel argument in that case bars application of equitable estoppel in this case, *Brief of Appellant*, p. 38, but in *Gizoni* the Court rejected the argument because the reliance element was missing. *Id.* *Gizoni* never entered into a binding settlement agreement wherein he stipulated to jurisdiction or obtained a formal award, whereas Gibson expressly stipulated to LHWCA jurisdiction, CP 28, contended he was a longshoreman covered under the Act, CP 33, and secured a settlement and formal award. CP 28-39; 41. Here, the critical reliance element is established and equitable estoppel bars the Jones Act suit.

Similarly, Gibson contends *Figueroa* precludes application of *collateral* estoppel (or issue preclusion), *Brief of Appellant*, p. 28, but Gibson ignores the fact that in *Figueroa* the Court found that the jurisdictional issue had not been addressed. *Id.* at 28-29. Here, Gibson expressly stipulated to LHWCA jurisdiction. CP 28. Here, the issue was

expressly addressed and resolved, and Gibson is precluded from re-litigating the issue.

Lastly, Gibson acknowledges that an administrative tribunal's decision may carry preclusive effect, but contends the issue must first be actually litigated to a final judgment. *Brief of Appellant*, p. 29. He cites no authority for this proposition. *Id.* Indeed, "for purposes of issue preclusion, a final judgment 'includes *any* prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.'" *Cunningham v. State*, 61 Wash. App. 562, 567, 811 P.2d 225 (1991) (emphasis added) (*citing* Restatement (Second) of Judgments §13 (1982)). The Administrative Procedures Act defines "adjudication" to mean an agency process for the formulation of an order, 5 U.S.C. §551(7), and this is precisely the case before this Court. Gibson's injury claim was administratively adjudicated, with the opportunity to be heard waived by both parties, and a formal award or compensation order was issued. CP 41. In fact, the adjudicator, the District Director,[13] expressly evaluated the settlement pursuant to 20 C.F.R. §702.243, CP 41, which includes consideration of the probability of success if the case were formally litigated. 20 C.F.R. §702.243(f).

[13] The district director is by definition an "adjudicator." 20 C.F.R. §702.241. Furthermore, Black's Law Dictionary defines "adjudicator" as "a person whose job is to render binding decisions; one who makes judicial pronouncements." Black's Law Dictionary, (7th Ed. 1999).

Gibson did not appeal. Therefore, whether characterized as *res judicata* or collateral estoppel, the claim *and* jurisdictional issue were both settled and a final disposition issued through the administrative proceedings outlined in the LHWCA, satisfying the final judgment element.

> It is now settled that administrative proceedings can have preclusive effect in the form of either *res judicata* or collateral estoppel. As the Supreme Court has noted:
>
> When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

Wickham Contracting Co. v. Bd. of Educ. of City of N.Y., 715 F.2d 21, 26 (2d Cir. 1983) (*quoting United States v. Utah Construction Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966)). "The policy underlying these rules is that *res judicata* should afford every party one but not more than one fair adjudication of his or her claim." *Lejeune v. Clallam County*, 64 Wash. App. 257, 266, 823 P.2d 1144 (Div. 2, 1992). Gibson was estopped from bringing a Jones Act/general maritime action, and Judge Sorensen correctly dismissed the action.

F. CONCLUSION

This case was correctly decided by Judge Sorensen. Gibson's Jones Act and general maritime claims are barred by his formal LHWCA award, his settlement with express stipulation to LHWCA jurisdiction,

election of remedies, and estoppel. The record establishes beyond dispute that Gibson obtained the requisite *Gizoni* formal award and further that the parties not only stipulated that his injury claim came within the jurisdiction of the LHWCA, but that this was also Gibson's express contention in the Agreed Settlement. This matter was thus administratively adjudicated, with the right to a hearing waived; jurisdiction was expressly resolved—Gibson made a clear choice between two mutually exclusive remedies; and American's liability for Gibson's injury claim was thereby extinguished. Judge Sorensen's decision to dismiss Gibson's Jones Act and general maritime claims under these facts was consistent with both Washington State policy and binding U.S. Supreme Court authority. Washington State adheres to the election of remedies doctrine when addressing state versus federal remedies for injured workers; the majority of federal courts apply this doctrine *and* the *Gizoni* formal award rule to bar seaman's remedies after a worker receives a formal award (settlement agreement and compensation order). Both the election doctrine and formal award rule protect the mutual exclusivity of longshore and seaman's remedies, as required by 33 U.S.C. §905(a). Permitting a worker under the facts of this case to pursue seaman's claims after obtaining a formal LHWCA award would violate the exclusivity provision of the LHWCA; conflict with numerous Supreme Court cases

reiterating that the LHWCA and Jones Act are mutually exclusive; and render the exclusivity provision meaningless. Moreover, allowing a worker who formally elects State workers' compensation or the LHWCA remedy under federal law to then sue his employer for the same injury would offend public policy. Immunity from suit, in exchange for no-fault benefits, is the policy under both the LHWCA, *see* 33 U.S.C. §905(a), and Washington's Industrial Insurance Act. *See* Wash. Rev. Code §51.32.010. Judge Sorensen should be affirmed, and costs should be awarded to American.

DATED this 10TH day of January, 2017.

Respectfully submitted,

LE GROS BUCHANAN & PAUL

By: _____

Eric R. McVittie, WSBA #20538
Markus B.G. Oberg, WSBA #34914
LeGros, Buchanan & Paul
4025 Delridge Way SW, Suite 500
Seattle, WA 98106-1271
(206) 623-4990
emcvittie@legros.com
moberg@legros.com

Attorneys for Respondent American Construction Company, Inc.

APPENDIX

33 U.S.C.A. § 908(i)
Compensation for Disability

. . .

(3) A settlement approved under this section shall discharge the liability of the employer or carrier, or both. Settlements may be agreed upon at any stage of the proceeding including after entry of a final compensation order.

. . .

20 C.F.R. § 702.242
Information Necessary for a Complete Settlement Application

. . .

(b) The settlement application shall contain the following:

(1) A full description of the terms of the settlement which clearly indicates, where appropriate, the amounts to be paid for compensation, medical benefits, survivor benefits and representative's fees which shall be itemized as required by § 702.132.

(2) The reason for the settlement, and the issues which are in dispute, if any.

(3) The claimant's date of birth and, in death claims, the names and birth dates of all dependents.

(4) Information on whether or not the claimant is working or is capable of working. This should include, but not be limited to, a description of the claimant's educational background and work history, as well as other factors which could impact, either favorably or unfavorably, on future employability.

(5) A current medical report which fully describes any injury related impairment as well as any unrelated conditions. This report shall indicate whether maximum medical improvement has been reached and

whether further disability or medical treatment is anticipated. If the claimant has already reached maximum medical improvement, a medical report prepared at the time the employee's condition stabilized will satisfy the requirement for a current medical report. A medical report need not be submitted with agreements to settle survivor benefits unless the circumstances warrant it.

(6) A statement explaining how the settlement amount is considered adequate.

(7) If the settlement application covers medical benefits an itemization of the amount paid for medical expenses by year for the three years prior to the date of the application. An estimate of the claimant's need for future medical treatment as well as an estimate of the cost of such medical treatment shall also be submitted which indicates the inflation factor and/or the discount rate used, if any. The adjudicator may waive these requirements for good cause.

(8) Information on any collateral source available for the payment of medical expenses.

20 C.F.R. § 702.243
Settlement Application; How Submitted, How Approved, How Disapproved, Criteria

. . .

(f) When presented with a settlement, the adjudicator must review the application and determine whether, considering all of the circumstances, including, where appropriate, the probability of success if the case were formally litigated, the amount is adequate. The criteria for determining the adequacy of the settlement application will include, but not be limited to:

(1) The claimant's age, education and work history;

(2) The degree of the claimant's disability or impairment;

(3) The availability of the type of work the claimant can do;

(4) The cost and necessity of future medical treatment (where the settlement includes medical benefits).

. . .

RCW 51.32.010
Who Entitle to Compensation

Each worker injured in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever: PROVIDED, That if an injured worker, or the surviving spouse of an injured worker shall not have the legal custody of a child for, or on account of whom payments are required to be made under this title, such payment or payments shall be made to the person or persons having the legal custody of such child but only for the periods of time after the department has been notified of the fact of such legal custody, and it shall be the duty of any such person or persons receiving payments because of legal custody of any child immediately to notify the department of any change in such legal custody.

33 U.S.C.A. § 905
Exclusiveness of Liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

. . .

33 U.S.C.A. § 903
Coverage

. . .

(e) Credit for benefits paid under other laws

Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 30104 of title 46 shall be credited against any liability imposed by this chapter.

RCW 51.04.010
Declaration of Police Power – Jurisdiction of Courts Abolished

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

RCWA 51.12.102
Maritime Workers – Asbestos-related Disease

(1) The department shall furnish the benefits provided under this title to any worker or beneficiary who may have a right or claim for benefits under the maritime laws of the United States resulting from an asbestos-related disease if (a) there are objective clinical findings to substantiate that the worker has an asbestos-related claim for occupational disease and (b) the worker's employment history has a prima facie indicia of injurious exposure to asbestos fibers while employed in the state of Washington in employment covered under this title. The department shall render a decision as to the liable insurer and shall continue to pay benefits until the liable insurer initiates payments or benefits are otherwise properly terminated under this title.

. . .

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served via email, a true and correct copy of the Brief of Respondent in the Court of Appeals, Division II, Cause No. 49340-3-II on the following counsel of record:

Philip A. Talmadge
Talmadge/Fitzpatrick/Tribe
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Zachary Herschensohn
Thornton Mostul Herschensohn PLLC
1000 Second Avenue, Suite 34200
Seattle WA 98104-1075
(206) 621-0600

Attorneys for Appellant Jeremy Gibson

Original +1 copy filed with:
Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct this 11th day of January, 2017.

Shelley Courter, Legal Assistant
Signed at Seattle, Washington